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Supreme Court of the United States

October Term, [redacted] 1970

No. 367

LYKES BROS. STEAMSHIP CO., INC.,
Petitioner,

versus

HESS SHIPPING CORPORATION and the
ST HESS VOYAGER, *in rem*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

October Term, 1969

No.

LYKES BROS. STEAMSHIP CO., INC.,
Petitioner,

versus

HESS SHIPPING CORPORATION and the ST HESS VOYAGER, *in rem*.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Now comes Lykes Bros. Steamship Co., Inc. and respectfully petitions this Honorable Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit on which that court, *standing evenly divided* on rehearing *en banc*, adhered, by operation of law, to its prior judgment of affirmance herein. A motion for certification to this Honorable Court was *"denied since with this Court evenly divided the issues can be as effectively presented by certiorari"*.

(a) Opinions Below.

The opinion of the United States Court of Appeals for the Fifth Circuit on rehearing *en banc*.[1] together with that court's denial of a second rehearing, *en banc*, with oral argument[2] and

[1] Appendix A, *infra*.
[2] Appendix B, *infra*.

of a motion for certification[3] are unreported. The original opinion of that court, Brown, Chief Judge, dissenting, is reported at 417 F. 2d 346, 1969 AMC 1787.[4] The opinion of the trial court, the United States District Court for the Southern District of Alabama, is reported at 285 F. Supp. 412, 1968 AMC 2019.[5]

(b) Jurisdictional Grounds.

(i) The original judgment of the United States Court of Appeals for the Fifth Circuit was rendered on October 10, 1969.

(ii) A rehearing *en banc* was granted by the United States Court of Appeals for the Fifth Circuit on December 15, 1969 and that court, standing evenly divided, ordered its judgment of affirmance adhered to by operation of law on April 28, 1970.

(iii) Motions for a second rehearing, *en banc*, with oral argument and for certification of the questions presented here were denied on June 17, 1970.

(iv) The jurisdiction of this Court is invoked under 28 USC 1254 (1).

(c) Questions Presented for Review.

The Court of Appeals held a rehearing *en banc* and was deadlocked, seven judges for reversal and seven judges for affirmance.

The questions presented by this petition are as follows:

(i) The resolution of the direct conflict between the judgment of the Fifth Circuit here and that of the Court of

[3] Appendix C, *infra*.
[4] Appendix D, *infra*.
[5] Appendix E, *infra*.

Appeals for the Second Circuit in the *GOLDSHELL-WHITE-PLAINS*, 224 F. 2d 86, 1955 AMC 1438, which held that inability to keep steerageway is not an excuse for exceeding moderate speed in fog.

(ii) The resolution of the direct conflict between the judgment of the Fifth Circuit here and that of the Court of Appeals for the Second Circuit in the *BURGEN-BERGECHIEF*, 274 F. 2d 469, 1960 AMC 1380, holding that observation of a target representing another vessel by "use of radar does not justify a failure to obey the rules of navigation generally applicable" in conditions of fog, including Article 16 of the Inland Rules requiring her to stop her engines and then navigate with caution on hearing the fog signal of another vessel directly ahead.

(iii) The need for all important guidance to navigators and lower courts, in cases dealing with collisions in fog and particularly those involving large and unwieldy tank vessels.

(d) Statutes and Regulations Involved.

Inland Rules, Article 16, June 7, 1897, c.4, § 1, 30 Stat. 99, 33 USC 192:

> "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> "A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

Inland Rules, June 7, 1897, c. 4, § 1, 30 Stat. 100, 33 USC 201:

"Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist."

Pilot Rules for Inland Waters, 33 CFR 80.13:

"(a) Moderate speed in fog. (1) Every steam vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"(b) A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over."

Pilot Rules for Inland Waters, 33 CFR 80.02:

"* * * Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist."

(c) Statement of the Case

The HESS VOYAGER, a large oil tanker or "super-tanker", was proceeding, in ballast, to Mobile, Alabama on March 3, 1966. Dense fog existed in the City of Mobile, its harbor and bay during the entire day, to the knowledge of her pilot. The HESS VOYAGER proceeded up the Mobile Bay Ship Channel and, by radar, located the downbound CHARLES LYKES at a distance of 2 miles. The CHARLES LYKES was observed to be on the same side of the channel as the HESS VOYAGER and, from the radar observations of the HESS

VOYAGER's master, remained there until the collision occurred. The HESS VOYAGER despite the known presence of the CHARLES LYKES, directly ahead of her and in her path, continued to proceed at 7½ knots through the water to the moment of collision. The fog at the time was so dense that the HESS VOYAGER could not sight a vessel more than 300 feet beyond her bow.

The HESS VOYAGER, while continuing to operate at this grossly immoderate speed, did not stop her engine on hearing the fog signal of the CHARLES LYKES forward of her beam. No steps were taken by the HESS VOYAGER to avoid the collision until the CHARLES LYKES broke out of the fog, 300 feet away, at which point the collision was inevitable.

The foregoing took place in the Mobile Bay Ship Channel just below the entrance to the port of Mobile. Navigation of a supertanker such as the HESS VOYAGER in this manner and under these conditions in such proximity to a metropolitan area patently gives rise to a tremendous risk of utter catastrophe through its potential for explosion or pollution. The Court of Appeals for the Fifth Circuit, through its inability to resolve the issues presented, having been deadlocked on rehearing, *en banc*, has served to affirm the decision below absolving the HESS VOYAGER from these obvious major faults:

(i) Proceeding at grossly excessive speed to the moment of collision in dense fog, although apprised that the other vessel was dead ahead of her;

(ii) Failing to stop her engine and then to navigate with caution on hearing the fog signal of another vessel ahead of her beam in dense fog; and

(iii) Accepting a radar observation of another vessel dead ahead as sufficient "ascertainment" to excuse compliance with the rules governing navigation in fog.

(f) Basis for Federal Jurisdiction.

The jurisdiction of the District Court is based on the admiralty and maritime jurisdiction of the United States, United States Constitution, Article 3, §2, 28 USC 1333.

(g) Reasons for Allowance of the Writ.

The objective of the navigation rules, which have been ignored by the Court of Appeals in this case, is set forth by the outstanding authority on American law of collision, Griffin on Collision (New York, 1949), p. 27, as follows:

> "It is obvious that rules, to be of any value must be enforced rigidly. 'The safety of navigation depends essentially upon *the certainty, which results from exact adhesion to general and well-known regulations*' (the *Emma Kate Ross*, 41 Fed. 826, 838 [1890]). * * *"

The departure from that certainty which is so plainly required if any degree of safety of navigation is to be obtained, is all the more incomprehensible when it is appreciated that the HESS VOYAGER is an oil carrying supertanker. The City of Mobile, through her navigation was subjected to a disaster by pollution or explosion of the magnitude of the TORREY CANYON or of Texas City. In an era in which safety of life at sea and the preservation of our ecology are of such prime importance, it is unthinkable that a court having responsibility for the enforcement of the navigation rules could countenance the actions of the HESS VOYAGER—yet this is precisely what the Fifth Circuit has done. This was pointed out by the dissent of Chief Judge Brown:

"* * * Rule 16 is now dead in the Fifth Circuit. * * * The decision obliterates the two mandatory imperatives of Rule 16—(1) moderate speed and (2) stopping engines.* * *

"* * * On this opinion navigators will know that breaching the moderate speed Rule-of-Sight is a mere technical violation.

"* * * As the judge-approved justification for ignoring the second mandate of Rule 16—stopping engines on hearing fog signal—the court gives its blessing to a vessel plowing right on in the fog toward a ship known to be in its path. * * *

"Considering the size of this vessel, one of the contemporary huge tankers of ever increasing size, to allow such speed, which does not even begin to pay even a deferential bow toward Rule 16, the court's action is nothing more than to write out Rule 16. It is to give judicial license to bigness, as though the ungainly, awkward nature of these floating boxes relieves them of compliance with any part of the rules except the qualifiers of 'special circumstances', 'existing circumstances', and the like. And, since on this Court's analysis S/T HESS VOYAGER could never safely navigate in channels or harbors at a speed less than 6 knots, it means that for her life, she need not pay heed to Rule 16 and its demand for moderate speed which, until today, has always meant capacity to stop in half the distance of visibility. * * * "

(i) The HESS VOYAGER was Guilty of Immoderate Speed.

Article 16 of the Inland Rules, 33 USC 192, requires that vessels, in fog, shall "go at a moderate speed, having careful regard for the existing circumstances and conditions". The "circumstances and conditions" are those inherent in the locale,

weather and visibility which affect the scene of collision, *The NORMANDIE*, 43 Fed. 151 (DC, NY, 1890). They do not excuse and they cannot be interpreted to excuse the immoderate speed of a vessel on the theory that she has been so constructed as to be incapable of operating at a moderate speed, *The EAGLE POINT*, 120 Fed. 449 (CA, 3, 1903); *The SAGAMORE*, 247 Fed. 743 (CA, 1, 1917).

The rule was stated by this Court that "big vessels may not insolently disregard smaller ones; super-size gives no right to domineer", *Wilson vs. Pacific Mail Steamship Co.*, 276 US 454, 72 L. Ed. 651, 48 S. Ct. 369 (1920). See also *Lewis vs. Jones*, 27 F. 2d 72, (CA, 4, 1938), cert. den. 278 US 634, 73 L. Ed. 551, 49 S. Ct. 32; *The DELTSCHLAND*, 129 Fed. 964 (DC, NY, 1904) aff. 137 Fed. 1018; *New York Central Railroad Company vs. Texaco, Inc.*, 226 F. Supp. 140 (DC, NY, 1964).

The landmark decision of this Court in *The PENNSYLVANIA*, 19 Wall. (86 US) 125, 134, 22 L. Ed. 148 (1873), deals with facts and is couched in language which are squarely on point here:

> "* * * And even if it were true that such a rate (seven knots) was necessary for safe steerage, it would not justify driving the steamer through so dense a fog along a route so much frequented, and when the probability of encountering other vessels was so great. It would rather have been her duty to lay to. * * *"

Apart from the plain dictates of the decisions of this Court, the opinion of the Fifth Circuit directly conflicts with that of the Second Circuit in the *GOLDSHELL-WHITE PLANS*, 224 F. 2d 86, 1955 AMC 1438, holding:

> "The Goldshell has moved for a rehearing because of testimony in that part of the record that was not printed and that we therefore did not have before us; i.e., that *she was moving only as fast as was necessary to keep steerageway. Though we were to accept this as true, it would not be an excuse for exceeding 'moderate speed' as we defined it in our original opinion: the command is imperative.* * * * At any rate we have so often held that *inability to keep steerageway is not an excuse*, that we shall adhere to that interpretation, until the Supreme Court corrects our mistake, if it is one." (Footnote omitted and emphasis added.)

The foregoing decision cannot be reconciled with that of the court here which held that the speed of the HESS VOYAGER was excused "because of the great size of the vessel, its length approaching twice the width of the channel" and "as a result, any reduction in speed would have seriously impaired the pilot's ability to control the vessel."

The rule of this Court and of the Second Circuit, so plainly ignored by the Fifth Circuit in this case, has been codified in the International Rules, 33 USC 1094(2), as follows:

> "A vessel navigating with the aid of radar in restricted visibility must, in compliance with Section 1077 (a) of this title, go at a moderate speed. * * * *Radar indications of one or more vessels in the vicinity may mean that 'moderate speed' should be slower than a mariner without radar might consider moderate in the circumstances.*" (Emphasis added.)

Although the International Rules do not apply here, certainly "they reflect the standard of care [in their navigation] required of ships having radar". *Standard Oil Company of California vs. SS ROTTI*, 286 F. Supp. 677, 1968 AMC 1992

(ND, Cal.), aff. 398 F. 2d 835, 1968 AMC 1991; cert. den. 393 US 980, 21 L. Ed. 2d 441.

The majority opinion of the Fifth Circuit pointed out that the HESS VOYAGER "was making approximately 6 knots an hour while stemming an ebbtide of one and one-half knots"; *a relevant speed of seven and one-half knots through the water*, the common medium in which the vessels were navigating[6] and this speed was maintained *"in a heavy fog which restricted the vessels from visual sightings of each other until they were approximately three hundred feet apart."*

The action of the court, in excusing this plain fault, cannot be reconciled, in any manner, with the prior decisions of this Court or of the Second Circuit. It plainly is wrong and is an open invitation to disaster if allowed to stand. We submit that this is one of those instances, however rare, when it is essential that this Court speak for the guidance of both the courts below and the navigators who must take their instructions from their decisions.

(ii) The HESS VOYAGER'S Radar Observations Did Not Excuse Her Failure to Comply with the Fog Rules.

The HESS VOYAGER, unable to see a vessel more than 300 feet forward of her bow, observed, by radar and at a distance of 2 miles, that the CHARLES LYKES was dead ahead and was approaching her on the same side of the channel. The CHARLES LYKES remained in this relative position, dead

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[6] This is the relevant speed. *O/Y Finlayson-Forssa vs. Pan Atlantic S. S. Corp.*, 259 F. 2d 11, 1958 AMC 2070 (CA, 5), cert. den. 361 US 882, 4 L. Ed. 2d 119, 80 S. Ct. 153; *The GOLDSHELL WHITE PLAINS*, 224 F. 2d 86, 1955 AMC 1438 (CA, 2)

ahead, while the vessels closed the 2 mile distance between them.

Article 16 of the Inland Rules requires that vessels, in fog, stop their engines and then navigate with caution on hearing the fog signal of another forward of the beam, the position of which cannot be "ascertained" by reason of the fog. The Fifth Circuit here, however, held that the radar observation by the HESS VOYAGER of the CHARLES LYKES, directly in its path, excused the HESS VOYAGER from compliance with Article 16. In discussing this the court, referring to the radar observations by the HESS VOYAGER, held:

> "The second condition requires that the position of the signaling vessel be unknown. Here the evidence clearly indicates that the HESS VOYAGER at all times knew the position of the CHARLES LYKES. * * * "

This decision of the Fifth Circuit is in direct conflict with that of the Second Circuit which held, in the *BURGEN-BERGEDIEF*, 274 F. 2d 469, 1960 AMC 1380, that the "use of radar does not justify a failure to obey the rules of navigation generally applicable". This rule again is one which has been specifically incorporated in the International Rules, 33 USC 1094(3):

> "When navigating in restricted visibility the radar range and bearing alone do not constitute ascertainment of the position of the other vessel under section 1077 (b) of this title sufficiently to relieve a vessel of the duty to stop her engines and navigate with caution when a fog signal is heard forward of the beam."

Once more there is a direct conflict between the circuits on one of the principal rules governing navigation in fog, the

very condition which leads to the vast majority of our maritime casualties.

(iii) The Necessity for a Precedent to Guide Navigators and Courts.

The affirmance, by operation of law, through the evenly divided court when the case was before the court on rehearing *en banc*, leaves the Fifth Circuit diametrically opposed to the Second Circuit.

The decisional law of the Supreme Court and of the Courts of Appeals does not merely furnish precedents for the lower courts but, most importantly, provides guidance for the navigators who are required to govern their conduct by the Rules as interpreted by the courts. In Farwell, *The Rules of the Nautical Road* (Rev. Ed., 1954), the author's preface states:

> "As teacher and practical mariner of some experience, the writer believes that a clear, definite, positive knowledge of the principles here presented should be an essential part of the professional equipment of every man on the bridge engaging in the practice of navigation. Court decisions in an overwhelming number prove that nearly all marine collisions follow violations of the rules of the road. *The inference is that the rules, if implicitly obeyed, are practically collision-proof. It is the writer's opinion that most of this seemingly disregard of the law is due to misunderstanding of the rules as interpreted by the courts. The rules will not be better obeyed until they are better understood.* Such a better understanding by the mariner is the primary purpose of this book." (Emphasis added)

There is no understanding of Rule 16 possible when there exists this conflict between the circuits as to the basic

requirements of moderate speed, ascertainment of location and stopping of engines. We submit that there is the most urgent need for clarification by this Court.

(h) Conclusion.

The judgment affirmed by the Fifth Circuit here clearly is wrong and directly conflicts with the decisions of the Second Circuit. The areas involved—the requirement of moderate speed, stopping of engines and navigating with caution in fog—are of the greatest importance to the lower courts and to navigators whose conduct is dependent upon the judicial interpretation of the rules.

Your petitioner accordingly prays that a writ of certiorari be granted to review the decision of the Court of Appeals for the Fifth Circuit in this case in order that the conflict existing between the circuits may be resolved.

Respectfully submitted,

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PILLANS, REAMS, TAPPAN, WOOD & ROBERTS.

CERTIFICATE

I, Benjamin W. Yancey, a member of the bar of this Court, do hereby certify that I have this day served a copy of the above and foregoing application to respondents' counsel of record, T. K. Jackson, Esq., by mailing a copy thereof, postage prepaid, to him at his office at Mobile, Alabama, on this day of July, 1970.

BENJAMIN W. YANCEY

APPENDIX A.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26703

HESS SHIPPING CORPORATION,
Plaintiff-Appellee,

versus

THE SS CHARLES LYKES, in rem and
LYKES BROS. STEAMSHIP CO., INC.,
Defendant-Appellant.

LYKES BROS. STEAMSHIP CO., INC.,
Plaintiff-Appellant,

versus

HESS SHIPPING CORPORATION and the
ST HESS VOYAGER, in rem,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Alabama

ON PETITION FOR REHEARING AND PETITION
FOR REHEARING EN BANC

(April 28, 1970)

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, and INGRAHAM, Circuit Judges.

BY THE COURT: On rehearing of this case en banc the court stands evenly divided, therefore judgment of affirmance is adhered to by operation of law.

APPENDIX B.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26703

HESS SHIPPING CORPORATION,
Plaintiff-Appellee,

versus

THE SS CHARLES LYKES, in rem and
LYKES BROS. STEAMSHIP CO., INC.,
Defendant-Appellant.

LYKES BROS. STEAMSHIP CO., INC.,
Plaintiff-Appellant,

versus

HESS SHIPPING CORPORATION and the
ST HESS VOYAGER, in rem,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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ON PETITION FOR REHEARING EN BANC
OF THE EN BANC DECISION

(June 17, 1970)

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, and INGRAHAM, Circuit Judges.

PER CURIAM:

No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on the Petition for Rehearing of the En Banc decision (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for such Rehearing En Banc with oral argument is DENIED.

APPENDIX C.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26703

HESS SHIPPING CORPORATION,
Plaintiff-Appellee,

versus

THE SS CHARLES LYKES, in rem and
LYKES BROS. STEAMSHIP CO., INC.,
Defendant-Appellant.

versus

HESS SHIPPING CORPORATION and the
ST HESS VOYAGER, in rem,
Defendant-Appellee.

MOTION FOR CERTIFICATION TO THE
UNITED STATES SUPREME COURT.

(June 17, 1970)

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON,

MORGAN, CLARK, and INGRAHAM, Circuit Judges.

PER CURIAM:

The Appellant's Motion for Certification to the United States Supreme Court is denied since with this Court evenly divided the issues can be as effectively presented by certiorari.

DENIED.

APPENDIX D.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26703

HESS SHIPPING CORPORATION,
Plaintiff-Appellee,

versus

THE SS CHARLES LYKES, in rem and
LYKES BROS. STEAMSHIP CO., INC.,
Defendant-Appellant.

LYKES BROS. STEAMSHIP CO., INC.,
Plaintiff-Appellant,

versus

HESS SHIPPING CORPORATION and the
ST HESS VOYAGER, in rem,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Alabama

(October 10, 1969)

Before BROWN, Chief Judge, GODBOLD, Circuit Judge, and CABOT, District Judge.

CABOT, District Judge: This is an appeal from an interlocutory decree holding Lykes Bros. Steamship Co., the appellant, solely at fault for the collision between its ship, The SS Charles Lykes, and the ST Hess Voyager owned by the Hess Shipping Corp., the appellee. Each party had sued the other and its vessel. The actions were consolidated for a non-jury trial limited to the issue of liability. The appellant Lykes asserts that the findings of fact and the conclusions of law, insofar as the latter relate to Hess's freedom from fault, are clearly erroneous.

The facts indicate that on the night of March 3, 1966, in the Upper Reach of Mobile Bay Channel, the outward-bound SS Charles Lykes and the inward-bound Hess Voyager collided at a point adjacent to buoy No. 42 and, as the lower court found, in the eastern portion of the channel.

The channel runs nearly due north and south and is 40 feet in depth for a width of 400 feet. Because the sides of the channel are sloped, it is possible for vessels drawing less than 40 feet to navigate outside the channel boundaries.

The collision occurred in a heavy fog which restricted the vessels from visual sightings of each other until they were approximately 300 feet apart. Two buoys are relevant to this discussion. Both are on the eastern side of the channel approximately 150 feet east of the channel boundary line, with buoy No. 44 being about one nautical mile to the north of buoy No. 42.

On the day of the collision, the Charles Lykes, (a C-2 type cargo vessel, 441 feet long and 63 feet wide, gross tonnage 8,178) departed the Alabama State Dock at about 9:00 P.M. under the control of her master, Capt. Beasley, and pilot, Capt. Walsh. The vessel steamed a course of 154 degrees through the inner harbor of Mobile Bay, also known as Pinto Reach, to its juncture with the Upper Reach which is marked by buoy No. 44. At this point the vessel was to turn to 182 degrees, the necessary coordinate for an outward-bound vessel. At the time, the pilot of the Charles Lykes was trying to follow the Claiborne, a vessel which had preceded it out of the harbor and which successfully executed the customary port to port pass with the Hess Voyager. However, upon negotiating the turn a problem developed. Although the Charles Lykes was equipped with radar, its unit did not indicate the existence of objects off either the port bow or dead ahead of the vessel. The lower court determined that this failure was caused by the negligent rigging and fixing of cargo booms at a height in excess of and thus in interference with the radar equipment. This interference prevented the Charles Lykes from picking up buoy No. 44 which resulted in a delay of its turn into the upper Reach Channel and further prevented it, upon its turn, from either tracking the course of the Claiborne or from picking up the Hess Voyager on its radar. The lower court concluded that because of these difficulties the Charles Lykes ended up in the eastern side of the channel.

The Hess Voyager, under her master, Capt. Castro, took on a pilot, Capt. Raley, about 30 miles from the site of the collision. At that point visibility was about four miles. However, fog was encountered when the Voyager reached a point about half way up the channel. Capt. Raley notified the Charles Lykes's pilot of the weather conditions and reduced speed to slow ahead.

Throughout this period the radar unit on the Hess Voyager was operating properly and was providing a view of all channel markers and other vessels. The Hess Voyager on at least one subsequent occasion warned the Charles Lykes by radio that the Charles Lykes was too far to the east and would have to move over to effect a safe passing. As the Hess Voyager approached buoy No. 42 prior to the collision, she was making approximately six knots an hour while stemming an ebb tide of 1½ knots, the wind blowing from the southwest at eight to twelve miles per hour. The Voyager maintained a course on the extreme eastern side of the channel, as the lower court found.

By the time both vessels reached buoy No. 42 and made visual sightings of each other, it was too late to avoid collision. The Charles Lykes went to full ahead and hard right rudder and the Hess Voyager to full astern and hard right. The Hess Voyager went aground just at or immediately after the collision. The vessels collided port to port and the Charles Lykes let out its anchors, finally stopping afloat with her bow facing northwest.

The lower court concluded that the Charles Lykes was guilty of gross negligence in rigging her booms in such a way as to greatly impair the effective use of her radar and was grossly at fault in failing to maintain a course on her own starboard side of the channel in violation of Article 25 of the Inland Rules, 33 U.S.C. § 210. It also concluded that any violations on the part of the Hess Voyager of Article 16 of the Inland Rules, 33 U.S.C. § 192, were technical in nature and could not be construed as a contributing cause of the collision.

Rule 52(a), Fed. R. Civ. P., applies in admiralty cases and the trial court's findings must be affirmed unless clearly

erroneous. *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20. A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 68 S.Ct. 525 (1948). This is not such a case.

Appellant argues that the court erred in failing to conclude that the Hess Voyager was at fault for operating at excessive speed in dense fog, for failing to stop her engines on hearing the fog signal of the Charles Lykes, and for failing to take any steps to avoid the collision. Article 16, of the Inland Rules, 33 U.S.C. §192, states:

> Every vessel shall in a fog . . . go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> A steam vessel *hearing* apparently forward of her beam, the fog signal of a vessel, *the position of which is not ascertained*, . . shall, *so far as the circumstances of the case admit*, stop her engines, and then navigate with caution until danger of collision is over. [Emphasis added.]

The standard of moderate speed as set forth in the statute is necessarily vague. Moderate speed, while less than full speed, is a relative term which depends upon the particular circumstances of each case. *Polarus S/S Co. v. T/S Sandefjord*, 236 F.2d 270 (2 Cir. 1956). This court long ago recognized that:

> Moderate speed is purely a relative term, which means no more than that the vessel must run at a prudent rate of speed. Time, place, and circumstance, rather than the swiftness of the vessel over her course, determine whether

the actual speed was immoderate, in that it was imprudent. *Quinette v. Bisso*, 136 F. 825, 830 (5 Cir. 1905).

Under the circumstances of this case the trial court was correct in concluding that the Hess Voyager was not operating at an immoderate speed. The Hess Voyager is a large tanker built in 1964, with a length of 708.2 feet, a beam of 102.4 feet, and gross tonnage of 27,015 tons. The testimony indicated that at full ahead she would make 17 knots and that at slow ahead she would make approximately four knots. The pilot estimated the current at 1½ knots and the speed at five or six knots over the ground. Whether a court recognizes the "Bare Steerage Rule," i.e., that "speed should be reduced to the lowest point consistent with good steerage," *Skibs A/S Siljestad v. S/S Mathew Luckenbach*, 215 F.Supp. 667, 679 (S.D. N.Y. 1963) or the "Rule of Sight," i.e., "the vessel must proceed at a rate of speed which will allow her to come to a stop within one-half limit of visibility." *O/Y Finlayson-Forssa A/B v. Pan Atlantic S/S Corp.*, 259 F.2d 11, 20 (5 Cir. 1958), both of which are tempered by and subject to analysis under the existing circumstances, *Polarus S/S Co. v. T/S Sandefjord*, supra, the conclusion is inescapable that because of the great size of the vessel, its length approaching twice the width of the channel, the direction and force of the wind, and its maintaining a course on the extreme eastern portion of the channel, the speed of the Voyager was not immoderate. It was prudent and moderate. The facts support and justify a conclusion that any reduction in speed would have seriously impaired the pilot's ability to control the vessel, which might have resulted in a more serious accident than that which occurred. See, *Cities Service Oil Co. v. M/V Melvin H. Baker*, 260 F. Supp. 244 (E.D. Pa. 1966). A reduction in speed would have been unreasonable and incon-

sistent with the rules of navigational safety. The district court did not err in concluding that the speed of the Hess Voyager was moderate.

Moreover, the district court did not err in concluding that the Hess Voyager did not contribute to the cause of the collision by failing to stop its own engines in violation of § 192.

Section 192 contains three prerequisites, all of which must be met before an affirmative duty is placed upon a steam vessel to stop her engines. First, the vessel must hear, apparently forward of her beam, the fog signal of the other vessel. This point is in conflict, but even if a finding is made that the Charles Lykes's signal was heard by the Hess Voyager, the other two conditions must be determined in favor of Hess, as we shall see.

The second condition requires that the position of the signaling vessel be unknown. Here the evidence clearly indicates that the Hess Voyager at all times knew the position of the Charles Lykes. In fact, as previously stated, the Hess Voyager on at least two occasions informed the Charles Lykes of her position and requested her to move over to starboard, requests which she acknowledged.

As to the third condition, the existing circumstances would not permit the Hess Voyager to stop her engines and then navigate with caution. This is so, for given the size of the Hess Voyager, the width of the channel, and the force and direction of the wind, stopping her engines would in all probability have resulted in her drifting crossways in the channel or partially blocking it, thus increasing the danger to other vessels in the area and the probability of a more serious collision

with the Charles Lykes. The wording of the statute is itself a patent recognition that stopping of the engines may be at odds with further "navigation with caution." This case is illustrative of that point. The lower court did not err in its conclusion that the Hess Voyager was without fault with regard to these points.

The appellant also attacks as clearly erroneous the trial court's determination of the position of the vessels prior to the collision. Here the appellant relies upon the interpretation of a course recorder which revealed a course which would have placed the Hess Voyager in the western portion of the channel at the time of the collision. However, as one court has so ably said:

> It [a course recorder], is not an infallible instrument. When considered in light of . . . disinterested witnesses . . . we believe it to be a reasonable inference to conclude that the course recorder did not reflect the true course, *Hess Tankship Co. v. SS M. L. Gosney*, 230 F. Supp. 1, 6 (E.D. Va. 1963).

In support of the finding of the trial court that the Hess Voyager was in the eastern portion of the channel, the testimony of several individuals is important. First, there is the testimony of Capt. Staggers of the Claiborne. He testified that when the Hess Voyager passed his vessel the Voyager was on the starboard (eastern) side of the channel, and that when the colliding vessels converged the Charles Lykes was in the center of the channel, or else to the east of the centerline. The record also reflects that upon notice from Capt. Raley, pilot of the

Hess Voyager, that the Charles Lykes was in the eastern portion of the channel; Capt. Walsh, pilot of the Charles Lykes reported to Capt. Raley that he was moving over, and the Charles Lykes did change its course, but not far enough to avoid the collision. Finally, here is the objective fact that at or immediately after the moment of impact the Hess Voyager went aground far to the east of the center line of the channel.

A revue of the entire evidence leaves this court with the definite and firm conviction that the district court did not err in determining that: (1) the Hess Voyager did not violate Article 25 of the Inland Rules, 33 U.S.C. § 210, in that she maintained a course to her own starboard side; (2) any violations of Article 16 of the Inland Rules, 33 U. S. C. § 192, by the Hess Voyager were technical in nature and were not a contributing cause of the collision; (3) the Hess Voyager did not otherwise contribute to the cause of the collision. The judgment of the district court is, therefore, AFFIRMED.

BROWN, Chief Judge, dissenting:

To express strong disagreement with the Court's decision I need not consider the record as I might perhaps read it. I just use the Court's characterization of the facts to demonstrate that Rule 16[1] is now dead in the Fifth Circuit except perhaps those portions which refer to "existing circumstances" or "so far as the circumstances of the case admit." Magnifying these quali-

[1] Article 16 of the Inland Rules, 33 U.S.C. § 192:

"Every vessel shall in a fog . . . go at a moderate speed having careful regard to the existing circumstances and conditions.

A steam vessel hearing apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

fiers the decision obliterates the two mandatory imperatives of Rule 16—(1) moderate speed and (2) stopping engines. The Court treats it as just a floating intersectional automobile collision in which the fact finder can look back and see what prudent people would have done.

But the genius of the Rules for Prevention of Collision is their certainty. Thus a red light means for one vessel to hold course and speed, the other to give way. In an overtaking the overtaken vessel must hold course and not cross or crowd upon the course of the overtaking ship. In crossing, the vessel having the other vessel on her starboard shall keep out of the way of the privileged ship.

But on this opinion navigators will know that breaching the moderate speed Rule-of-sight is a mere technical violation.[2]

But it is hardly a technical violation when not only the risk of collision, but collision itself occurred because both vessels continued on ahead, continuously closing the interval between them. A result so plain in fact cannot be glossed over by the metaphysical dialectic of proximate cause.

More than that, this was a collision which should never have occurred. Although with defective radar she could not "see" S/T Hess Voyager, the descending S/S Charles Lykes knew of her presence. Worse, as the judge-approved justification for ignoring the second mandate of Rule 16—stopping engines

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[2]With obvious approval the Court paraphrases the trial court's conclusion: "It also concluded that any violation on the part of the Hess Voyager of Article 16 of the Inland Rules, 33 U.S.C. §192, were technical in nature and could not be construed as a contributing cause of the collision." . . . F.2d . . . .

on hearing fog signal—the Court gives its blessing to a vessel ploughing right on in the fog toward a ship known to be in its path. This is what we say: "The second condition requires that the position of the signaling vessel be unknown. Here the evidence clearly indicates that the Hess Voyager at all times knew the position of the Charles Lykes. In fact, as previously stated, the Hess Voyager on at least two occasions informed the Charles Lykes of her position and requested her to move over to starboard, requests which she acknowledged." . . . F.2d . . .

Earlier, the court phrased it this way: "Throughout this period the radar unit on the Hess Voyager was operating properly and was providing a view of all channel markers and other vessels. The Hess Voyager on at least one subsequent occasion warned the Charles Lykes by radio that the Charles Lykes was too far to the east and would have to move over to effect a safe passing." . . . F.2d. . .

In a restricted channel of 400 feet[3] in "a heavy fog which restricted the vessels from visual sightings of each other until they were approximately 300 feet apart." . . . F.2d. . . S/T Hess Voyager "was making approximately six knots an hour while stemming an ebb tide of 1½ knots."[4] . . . F.2d . . .

At this speed she was making 600 feet per minute, a distance double that of her visibility and four times the half of visible distance. So gross was this *im*moderate speed that her

[3] "The channel runs nearly due north and south and is 40 feet in depth for a width of 400 feet. Because the sides of the channel are sloped; it is possible for vessels drawing less than 40 feet to navigate outside the channel boundaries." . . . . F .2d . . . .

[4] With each vessel floating and underweigh the tide is irrelevant with respect to the positions of the vessels relative to each other, not fixed objects.

knowledgeable counsel did not even undertake to prove, by experiments, tests, expert witnesses, or otherwise just what time it would take from 6 knots ahead to dead stop or the distance S/T Hess Voyager would run in that maneuver. It is plain to everyone who knows anything of vessel operation that she could not stop in one half a minute—300 feet—and certainly not in one half the visibility, a quarter of a minute in 150 feet.

Considering the size of this vessel, one of the contemporary huge tankers of ever increasing size,[5] to allow such speed, which does not even begin to pay even a deferential bow toward Rule 16, the Court's action is more than to write out Rule 16. It is to give judicial license to bigness, as though the ungainly, awkward nature of these floating boxes relieves them of compliance with any part of the rules except the qualifiers of "special circumstances", "existing circumstances", and the like. And, since on this Court's analysis S/T Hess Voyager could never safely navigate in channels or harbors at a speed less than 6 knots, it means that for her life, she need not pay heed to Rule 16 and its demand for moderate speed which, until today, has always meant capacity to stop in half the distance of visibility. *O/Y Finlayson-Forssa A/B v. Pan Atlantic S/S Corp.*, 5 Cir. 1958, 259 F.2d 11, 20, 1958 A.M.C. 2070, cert. denied, 1959, 361 U.S. 882, 80 S.Ct. 153, 4 L.Ed.2d 119. Nor will she suffer the burden imposed on smaller craft of the rule of *The Pennsylvania*, 1873, 86 U.S. 125, 19 Wall. 125, 22 L. Ed. 148, that a violation must establish not only that the breach did not, but could not, have caused the collision. Tempered occasionally by notions of major—minor fault, last clear chance, etc., this stringent demand still prevails, expecially, until today, in fog

[5] The Hess Voyager is a large tanker built in 1964, with a length of 708.2 feet, a beam of 102.4 feet, and gross tonnage of 27,015 tons.

cases. *Finlayson-Forssa A/B vs. Pan Atlantic S/S Corp.*, 259 F.2d at 22.

It will be interesting to see what we will do with the next fog case in which two ocean going vessels capable from smaller size of reducing speed safely to the Rule-of-sight seek absolution for flagrant breach by incanting our *S/T Hess Voyager*.[6]

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[6]It is incongruous that Congress in its then technical ignorance of all modern scientific marvels such as radar and ship-to-ship radio, put store on signals, ability to see and peremptory commands. The fact is that neither ship was navigating by the Rules. These were junked for radar. And one, with full knowledge of the other's position charged headlong into certain collision. Compliance with the Rule would have avoided it.

APPENDIX E.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. 4340-66

HESS SHIPPING CORPORATION,

versus

THE SS CHARLES LYKES, in rem and
LYKES BROS. STEAMSHIP CO., INC.,

Civil Action No. 4341-66

LYKES BROS. STEAMSHIP CO., INC.,

versus

HESS SHIPPING CORPORATION and the
ST HESS VOYAGER, in rem.

OPINION

This consolidated litigation arises out of a collision between the SS CHARLES LYKES and the ST HESS VOYAGER which occurred on the night of March 3, 1966, at

approximately 2210 hours in the Upper Reach of Mobile Bay Ship Channel near Buoy No. 42, about one mile south of the mouth of the Mobile River.

Hess Shipping Corporation as owner and operator of the ST HESS VOYAGER filed suit for its damages against Lykes Brothers Steamship Co., Inc. as owner and operator of the SS CHARLES LYKES and against the SS CHARLES LYKES in rem, and Lykes Brothers Steamship Co., Inc. likewise filed suit for its damages against Hess Shipping Corporation and the ST HESS VOYAGER. The suits were consolidated for trial and it was stipulated that the cases would be tried on the issues of liability and that the damages would be determined in subsequent proceedings, if necessary.

The CHARLES LYKES is a C-2 type cargo vessel, 441 feet long, 63 feet wide and with a gross tonnage of 8,178 tons. The HESS VOYAGER is a large tanker, 708 feet in length, 102 feet wide and a gross tonnage of 27,015 tons. Both vessels were propelled by single screw steam turbine engines. The HESS VOYAGER was inbound to the Port of Mobile from sea; the CHARLES LYKES was outbound from Mobile to Pascagoula, Mississippi, a relatively short run from Mobile. Both vessels were light.

The vessels were under the conn of Mobile Bar Pilots. When the pilot of the HESS VOYAGER boarded that vessel at the sea buoy, about 30 miles from the scene of the collision, visibility was good, being about four miles. When the pilot of the CHARLES LYKES boarded his vessel at the Alabama State Docks, approximately three and one-half miles from the scene of the collision, visibility was restricted but was believed to be clearing in that immediate area. Near Beacon No. 28, approxi-

mately one-half the way up the channel, the HESS VOYAGER encountered thick fog. Pilots of the Mobile Bar Pilots Association are equipped with walkie-talkie radios. The pilot of the CHARLES LYKES, before leaving the dock, communicated by voice radio with the pilot of the HESS VOYAGER and was advised by the latter that the HESS VOYAGER was encountering thick fog in the vicinity of Beacon No. 30, about five miles from the scene of the collision. However, the pilot of the CHARLES LYKES did not suggest to the vessel's master that the vessel's departure be delayed for a short while in order to avoid meeting and passing the HESS VOYAGER in fog in the narrowest part of the channel.

The collision occurred in the northern portion of the Upper Reach of Mobile Bay Ship Channel. It is necessary to describe the physical characteristics of this portion of the channel in order to visualize the events leading up to the collision. The channel is 40 feet in depth for a width of 400 feet. Because the sides of the channel are sloped it is possible for vessels drawing less than 40 feet to navigate slightly outside the 400 foot boundaries. On either side of the dredged area are spoil banks covered by three or four feet of water. The channel runs nearly due north and south. There are but two navigational aids, Buoy No. 44 and Buoy No. 42, in this portion of the channel and both are located on the eastern side of the channel and are approximately 150 feet eastward of the 400 foot eastern boundary line.

Both vessels were equipped with radar sets. The CHARLES LYKES radar could not be properly operated or relied upon because of the manner in which the booms and their related equipment had been rigged. When the vessel sailed the booms had been left in an upright position rather than being lowered

and seated in cradles. The antenna or scanner of the radar was installed on the starboard side of the midshiphouse and did not extend upward as high as the booms in their upright position. This faulty rigging of the booms prevented the radar from detecting targets dead ahead and off the port bow of the vessel and this in turn resulted in the failure of the radar to detect the HESS VOYAGER or the channel markers located on her port side. Conversely, the radar on the HESS VOYAGER was operating properly and was providing its operators with a view of all the channel markers and other vessels.

When fog was encountered the HESS VOYAGER reduced speed to Slow Ahead and commenced sounding fog signals. She met and passed, port to port, several other vessels, including two steamships, without incident. Because of her length, nearly double the width of the channel, she did not consider it prudent to anchor, as this maneuver might have resulted in her blocking the entire channel. Her first radar observation of the CHARLES LYKES came when the vessels were nearly two miles apart. Because the CHARLES LYKES appeared on the radar to be too close to the eastern side of the channel the HESS VOYAGER inquired over the radio if the CHARLES LYKES was equipped with radar and received an affirmative response. When the vessels were one and one-half miles apart the pilot of the HESS VOYAGER again contacted the pilot of the CHARLES LYKES and requested the latter to move over to his own starboard side of the channel so the vessels would clear port to port. This was answered by the pilot of the CHARLES LYKES to the effect that he was in the process of moving over. When the vessels were approximately one-half mile apart, a similar request was made by the pilot of the HESS VOYAGER and the same response as before was received from the CHARLES LYKES.

When the vessels were visually sighted by each other, their bows were only 300 feet apart. They were very nearly head to head; the CHARLES LYKES went in quick succession from Slow Ahead to Half Ahead to Full Ahead on a hard right rudder; the HESS VOYAGER went Full Astern on a right rudder and was aground at the moment of collision. Initial contact was near the bow on the port side of each vessel.

Not surprisingly, the bone of contention consisted of charges by each vessel that the other was on the wrong side of the channel. A preponderance of the more credible evidence shows clearly that the CHARLES LYKES was on the wrong side of the channel. In an effort to avoid the on-coming CHARLES LYKES, the HESS VOYAGER grounded at the moment of collision on the eastern extremity of the channel. She was so far out of the channel that the tug that came to pull her free also went aground. Shortly before the collision, a disinterested witness, the master of the SS. Claiborne, made a radar observation of the position of the CHARLES LYKES in the channel; his observation placed her well over on the eastern side of the channel.

The CHARLES LYKES charges that the HESS VOYAGER was in violation of Article 16 of the Inland Rules in failing to stop her engines on hearing a fog signal forward of her beam and in failing to navigate so as to have been able to stop within one-half the range of visibility. By including the clause, "so far as the circumstances of the case admit", Article 16 recognizes that literal compliance with its terms is not applicable in every instance. Considering the narrowness of the channel, the size of the vessel and the weather conditions, the HESS VOYAGER was justified in not stopping her engines or attempting to anchor. The question of whether or not she could have stopped

her headway by use of her own engines within one-half the range of visibility is not applicable here for it is apparent from all of the evidence that the HESS VOYAGER was aground at the moment of collision and that the CHARLES LYKES would have collided with her even if she had been dead in the water.

The foregoing shall constitute the court's Findings of Fact.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the subject matter and of the parties to these consolidated suits.

2. The CHARLES LYKES was guilty of gross negligence in rigging her booms in such a way as to greatly impair the effective use of her radar. *Continental Oil Co. v. The M/V Glenville*, (S.D. Tex. 1962) 210 F. Supp. 865, 1962 A. M. C. 2311; *The Medford*, (E. D. N. Y.) 65 F. Supp. 622, 1946 A. M. C. 795; *The T.J. Hooper*, 60 F. (2nd) 737, 1931 A. M. C. 1764.

The CHARLES LYKES was grossly at fault in failing to maintain a course on her own starboard side of the channel. Inland Rules, Article 25, 33 U.S.C. 210. *The Standella* (CA5) 103 F. (2nd) 619, 1940 A. M. C. 286; *The Union Reliance*, (S.D. Tex. 1963) 222 F. Supp. 874, 882, 1965 A.M.C. 901, 914.

Any violations of Article 16 of the Inland Rules, 33 U. S. C. 192, on the part of the HESS VOYAGER were technical in nature and cannot be construed as a contributing cause of the collision. *The Standella, Supra; Compania de Madras v Queenston Heights*, (CA5) 220 F. (2nd) 120, 1955 A.M.C. 797; *Whitestack Towing Corp. v. Bethlehem Steel Co.* (CA4) 279 F.

(2nd) 419, 1960 A.M.C. 2294; *Universal Ins. v. The Coast Banker*, 129 F. (2nd) 395, (CA9) 1942 A.M.C. 1293; *The Providence v. The Georgia*, 282 Fed. 658; *The Law of Admiralty* by Gilmore and Black Pages 404-406.

Let an interlocutory decree be entered in favor of Hess Shipping Corporation and against the SS CHARLES LYKES and Lykes Brothers Steamship Co., Inc. holding the SS CHARLES LYKES solely at fault. If damages cannot be settled by consent, either party may make application to the court for further proceedings to determine damages.

INTERLOCUTORY DECREE

It is ORDERED, ADJUDGED, AND DECREED that Hess Shipping Corporation recover of and from the SS CHARLES LYKES and Lykes Brothers Steamship Co., Inc. the damages sustained by it in consequence of the matters referred to in its Complaint together with interests and costs; and that the Complaint of Lykes Brothers Steamship Co., Inc. be dismissed with costs; and it is further

Ordered that application for ascertainment of damages may be made to the court by the parties, or any of them, if the same cannot be agreed upon within sixty days from this date.

Entered this 28th day of May 1968.

DANIEL H. THOMAS
Chief Judge, U. S. District Court
Southern District of Alabama.